89-620

NO. A-1020

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1989

RICHARD W. ELLIOTT, PETITIONER

v.

HOWARD A. ANDERSON, JR.
PERSONAL REPRESENTATIVE OF THE
ESTATE OF J. RUSSELL HORNSBY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

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PRO SE

QUESTIONS PRESENTED

1. Whether a State bar rule requiring mandatory fee arbitration without opportunity for trial de novo (including jury trial) violates the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.

2. Whether a State Supreme Court's inherent power to regulate the Bar supercedes due process and equal protection guarantees of the Fourteenth Amendment to the United States Constitution when it denies an attorney a right to trial by jury under State law.

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IN THE SUPREME COURT OF THE

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OCTOBER TERM, 1989

No. A-1020

RICHARD W. ELLIOTT
Petitioner

v.

HOWARD A. ANDERSON, JR., PERSONAL REPRESENTATIVE OF THE ESTATE OF J. RUSSELL HORNSBY
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

Richard W. Elliott, pro se, petitions for a Writ of Certiorari to review the judgment of the Supreme Judicial Court of Maine sitting as the Law Court affirming the judgment of the Superior Court of Lincoln County, Maine.

OPINION BELOW

The opinion of the Supreme Judicial Court of Maine is reported at 555 A2d 1042 (Me. 1989) and attached hereto as Appendix A.

JURISDICTION

The decision of the Supreme Judicial Court of Maine was entered on March 8, 1989. Petitioner subsequently filed a timely Motion for Reconsideration which was denied on March 27, 1989. Petitioner filed a timely Motion for Extension of Time to file this Petition. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1257.

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

1. The Fourteenth Amendment to the Unites States Constitution provides in pertinent part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of live, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Maine Bar Rule 3.3(c) provides:

> Fee Arbitration. A lawyer admitted to practice in this State shall submit, upon the request of his client, the resolution of any fee dispute in accordance with Rule 9.

3. Maine Bar Rule 9 provides in pertinent part:

> (e) PROCEDURES.
> (1) Initiation of Proceedings Upon receiving a complaint from any source regarding legal fees paid to or charged by an attorney admitted to the Bar of this State the Secretary shall forward to such complainant a copy of these procedures and any relavant regulations or rules adopted by the Board or the Commission with respect to fee arbitration, togeher with the blank form captioned "Petition for Arbitration of Fee Disputes". Proceedings before a Fee Arbitration Panel of the Commission shall be initiated by the completion and forwarding to the Secretary of the Petition. . . .
>
> (5) Referral to Arbitration Panel
>
> (D) If there is then pending before a court or agency of this State an action instituted by either petitioner or repondent involving the disputed fees, then such action shall, upon motion of the petitioner, be stayed until such dispute is resolved pursuant to this rule;

and the award hereunder shall be determinative of the action so stayed.

(7)(f) Failure of the Attorney to Reply. If the attorney fails, without good cause, to file his reply within 30 days next after the mailing to him of the copy of the petition, form of reply and the copy of the procedures and regulations; or if he fails to appear in the proceedings without good cause, the panel may proceed to hear the petition and make its findings and award upon the evidence produced by the petitioner and the attorney shall be bound by the findings and award of the panel in the same manner, and with the same effect, as a default judgment entered by the Superior Court of this State.

(h) Arbitration Award.
(1) The decision of the arbitration panel shall be expressed in a written award, signed by all of the panelists hearing the matter, and thereupon filed with the Secretary. If there is a dissent, it shall be signed separately, but the award shall be binding if signed by a majority of the arbitrators. An award may also be entered on consent of the parties. Once the award is

signed and filed, the hearing may not be reopened except upon consent of all parties and a majority of the arbitrators serving on the arbitration panel which heard the matter.

I. STATEMENT

The Maine Supreme Judicial Court promulgated the Maine Bar Rules in 1978. Rule 9 and 3.3(c) established mandatory binding arbitration of attorney/client fee disputes.

The dispute involved a fee arrangement between the Petitioner (hereinafter "Elliott") and one J. Russell Hornsby, a practicing attorney in another State (Florida). On October 27, 1987, a Petition for Arbitration ofFee Dispute was forwarded to the Board of Overssers of the Bar (Fee Arbitration Commission) by one Howard A. Anderson, Jr. in his capacity as Personal Repre-

sentative of the Estate of J. Russell Hornsby (hereinafter "Anderson") (Hornsby having died in July 1986); and on or about November 17, 1987, Elliott was notified by the Secretary of the Fee Arbitration Commission that Howard A. Anderson, Jr., Personal Representative for the Estate of J. Russell Hornsby, had petitioned the Fee Arbitration Commission for arbitration of a fee dispute. On December 8, 1987, Elliott forwarded "Respondent's Reply" to the Fee Arbitration Commission. Hearing was held on February 18, 1988 before Panel No. II of the Fee Arbitration Commission. Prior to the hearing, the Commission was cognizant of the fact that the matter of Elliott v. Anderson, Jr., P.R. (involving the same fee dispute issue) was pending in Lincoln County (Maine)

Superior Court and that Anderson had not filed a motion to stay same. On or about March 8, 1988, Anderson filed an Application for Confirmation of Arbitration Award. On April 8, 1988, Elliott filed an Application to Vacate the Award. On April 11, 1988, hearing was held in Lincoln County Superior Court on both Anderson's Application for Confirmation of Arbitration Award and Elliott's Application to Vacate the Award. On April 15, 1988, the Court confirmed the subject award and Judgment was granted to Estate of J. Russell Hornsby in the amount of $2,500.00 plus interest and costs; and the pending matter concerning the same set of circumstances as the underlying fee dispute (Elliott v. Anderson/Lincoln (Maine) Superior Docket No. CV87-33) was

dismissed by the Court.

On May 13, 1988, Elliott filed his Notice of Appeal in accordance with Rule 73(b) MRCivP, as amended. The Maine Supeme Judicial Court sitting as the Law Court held that "(n)othing in the jury trial provision of the Maine Constitution stands in the way (of court-ordered mandatory fee arbitration)".

II. REASONS FOR GRANTING THE WRIT

A.(1) A State Bar Rule Requiring Mandatory Fee Arbitration Without Opportunity for Trial De Novo (including jury trial) Violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

(2) A State Supreme Court's In-

herent_power_to_Regulate_the_Bar_Can_Not and_Does_Not_Supercede_Due_Process_and Equal_Protection_Guarantees_of_the Fourteenth_Amendment_to_the_United States_Constitution_When_It_Denies_an Attoney_a_Right_to_Trial_by_Jury_Under State_Law.

This case presents questions of extreme importance to the legal profession on a national scale. Thirty states have some form of attorney-client fee arbitration programs with all of the programs being voluntary except for five States having some form of compulsory fee arbitration statute. These States are: California, Alaska, South Carolina, New Jersey and Maine.

Alaska provides for appellate review of the award in Superior Court. AS90.43.180. California rules provide

for the issuance of only an advisory opinion by the panel if one side refuses to be bound and also provides for a trial de novo. Section 6203,6204 CA State Bar Act. New Jersy provides for a limited appellant review of the arbitration award. The Maine rules provide for mandatory arbitration with no exceptions or appellate procedure. Consequently, this decision is likely to be of extreme imortance to those States considering some type of mandatory fee arbitration rule and to the profession as a whole.

Such compulsory arbitration where the effect of the statute has been to compel parties to submit to arbitration, without any agreement or assent on their part to do so, has caused courts to declare them unconstitutional on the

grounds that such statutes deprive parties of liberty and property without due process of law, or the right to a trial by jury.

Only one case has been found where the validity of a statute or rule compelling arbitration of an attorney/client fee dispute has been expressly considered previously by the courts. In that case, it was held that a court rule, promulgated under the authority of the court to regulate all aspects of the practice of law, allowing a client to resort to compulsory, unappealable arbitration, did not deny an attorney equal protection of the law, or the right to trial by jury, and did not violate the due process clause of the federal constitution.

Thus, the Supreme Judicial Court of

Maine relied on the case of In re Li Volsi, 85 NJ 576, 428 A2d 1268 (NJ 1981) to uphold its similar Bar rule from constitutional attack.

This case can and must be distinguished from the present case on due process grounds. First, the New Jersey Supreme Court in Li Volsi explained that in New Jersey attorneys never had an absolute right to trial by jury in fee dispute cases. The Court held that the State constitution guaranteed the right to trial by jury only to the extent that the right existed prior to the adoption of the constitution in 1947. In New Jersey, the burden is placed on the party seeking a jury trial to show that it existed prior to the adoption of the State constitution.

In Maine, on the other hand, the burden is on the State to show that such a jury trial right did not exist prior to the adoption of the State Constitution in 1820. In this case, the Maine Supreme Judicial Court could not meet its burden of demonstrating that there existed no jury trial right in fee dispute cases prior to 1820. Therefore, the Court denied the Petitioner the due process of the law under the Fourteenth Amendment by reasoning that it need not address the issue due to its inherent constitutional power to regulate the bar. See, Anderson v. Elliott, 555 A2d 1042 (Appendix A).

Moreover, compulsory arbitration statutes are never valid unless the appeal procedure sufficiently protects the constitutional rights of the

compelled party with trial de novo before a jury.

> Arbitration, as commonly understood, is a proceeding voluntarily initiated by the parties, and at common law its basis is their voluntary act. Some statutes, however, have provided for what is known as "compulsory arbitration", which has been defined as an arbitration proceeding to which the consent of at least one of the parties is enforced by statutory provisions. Generally, when the effect of statutes has been to coerce parties to submit to arbitration, without any agreement or assent on their part to do so, the courts have declared them unconstitutional as depriving the parties of liberty and property without due process of law, or as depriving parties of their constitutional right to a trial by jury. 5 AmJur 2d, "Arbitration and Award", Section 9.

(Pennsylvania has recently considered this issue and set forth an excellent constitutional analysis. See Dickerson v. Hudson, 302 A2d 444 and Application of Smith, 112 A2d 625.)

As petitioner is first and foremost a citizen of the United States and thereby protected by the guarantees of the Constitution of the United States, he cannot be compelled to give up those rights through State action. Being compelled to arbitrate in order to practice law in the State of Maine denies petitioner constitutional due process protections. Further, petitioner is denied both a property interest and a liberty interest without due process.

The appeal procedure as defined in 14 MRSA, Section 5945:

> Appeals
>
> 1. Grounds for Appeal. An appeal may be taken from:
>
> A. An order denying an application to compel arbitration made under Section 5928;

B. An order granting an application to stay arbitration made under Section 5928, Subsection 2;

C. An order confirming or denying confirmation of an award;

D. An order modifying or correcting an award;

E. An order vacating an award without directing a rehearing; or

F. A judgment or decree entered pursuant to the provisions of this chapter.

is constitutional when read in conjunction with the rest of the non-compulsory arbitration statute (Uniform Arbitration Act). However, when said appeal procedure is used as an appeal procedure for compulsory arbitration (i.e. Maine Bar Rule 3.3(c)), the appeal will no longer pass constitutional muster. Where arbitration is compulsory by rule or statute, the appeal must include a trial de novo before a jury or some other

procedural safeguard or the rule/statute is unconstitutional.

The Board of Overseers of the Bar has recognized this very concept in an analogous situation. Maine Bar Rule 7(e)(6)(D):

> (D) De Novo Proceedings: Suspension or Disbarment. If the Grievance Commission determines that the matter should be concluded by suspension or disbarment, and an information thereafter is filed pursuant to Rule 7(e)(6), the matter before the court shall not be a review of the proceedings before the Grievance Commission but instead shall be heard de novo upon new proof and arguments.

acknowledges that an attorney cannot be disbarred or suspended by Board action but must have a trial de novo. Unquestionably, disbarment and suspension affect an attorney's liberty

and property interest and as such can not be abridged without due process.

A fee dispute affects the same monetary interest that a suspension or disbarment affects. Yet, appeal of an arbitration proceeding does not allow trial de novo.

Lastly, it cannot be argued that petitioner somehow waived his constitutional rights to a jury trial and due process. Petitioner has never affirmatively nor impliedly waived such rights. In fact, when petitioner filed suit in Superior Court on April 7, 1987 (Elliott v. Anderson, Personal Representative/Lincoln Superior Docket No. CV87-33), his constitutional right to a jury trial became vested and can never be impliedly waived.

There is no question that Maine's

Bar Rules are compulsory concerning attorneys. It is further unarguable that Maine's Bar Rules fail to provide trial de novo (including jury trial) in fee arbitration proceedings or appeal of same. As such, petitioner has been deprived of his constitutional rights and due process under both the United States Constitution (Seventh Amendment) and the Constitution of Maine (Article I, Section 20) (see City of Portland v. DePaolo, 531 A2d 669 (Me. 1987) in which the Maine Supreme Judicial Court held that the Maine Constitution guarantees to parties in all civil actions the right to a jury trial except where by the common law and Massachusetts' statutory law which existed prior to the adoption of the Maine Constitution in 1820 such cases

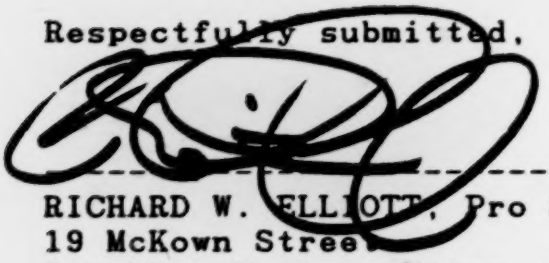
were decided without a jury. Id. at 670.

CONCLUSION

The Petition for Writ of Certiorari should be granted for the foregoing reasons.

DATED: October 17, 1995

Respectfully submitted,



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APPENDIX A

MAINE SUPREME JUDICIAL COURT

Reporter of Decisions
Decision No. 5009
Law Docket No. LIN-88-190

HOWARD A. ANDERSON, JR.

V.

RICHARD W. ELLIOTT

Argued November 2, 1988
Decided March 8, 1989

Before McKUSICK, C. J., and ROBERTS, WATHEN, CLIFFORD, HORNBY and COLLINS, JJ.

McKUSICK, C. J.

On this appeal by a practicing Maine Lawyer, we reject his attack on the constitutionality of the requirement of the Maine Bar Rules that he submit to binding arbitration of a dispute with his client over the lawyer's fee.

The Supreme Judicial Court promulgated the Maine Bar Rules in 1978. Rule 9

establishes a mechanism for binding arbitration of attorney-client fee disputes under the jurisdiction of the Board of Overseers of the Bar, and Rule 3.3(c) obligates an attorney to submit any fee dispute to Rule 9 arbitration at the client's request. After ten years of operation, this client-initiated compulsory fee arbitration process now faces its first consitutional challenge. Boothbay Harbor attorney, Richard W. Elliott, whose suit in the Superior Court to recover a fee from his client was dismissed as the result of a Rule 9 proceeding, argues that the Supreme Judicial Court in its rulemaking has infringed his right under the Maine Constitution to trial by jury "[i]n all civil suits ... except where it has heretofore been otherwise practiced."

Me. Const. art. 1, Section 20.[1] We hold that the establishment of this fee dispute resolution process is within the Supreme Judicial Court's inherent power to regulate the bar, and we affirm the judgment of the Superior Court (Lincoln County; Perkins, J.) confirming an award by the Fee Arbitration Commission of the

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[1] Elliott also claims a right of jury trial under the Seventh Amendment, but the Supreme Court held in Minneapolis & St. Louis R.R. v. Bombolis, 241 U.S. 211, 217 (1916) that "the Seventh Amendment applied only to proceedings in courts of the United States and does not in any manner whatever govern or regulate trials by jury in state courts." Unlike other preincorporation decisions, Bombolis, even though originally grounded in a general principle "[t]hat the first ten Amendments ... are not concerned with state action and deal only with Federal action," id., has never been overruled. See 9 C. Wright & A. Miller, Federal Practice and Procedure, Section 2303 & n. 76 (1971 & Supp. 1988)

Board of Overseers in favor of Howard Anderson, the personal representative of Elliott's deceased client J. Russell Hornsby.

I.

The Fee Dispute

In the fall of 1983, Hornsby, himself a practicing lawyer in Orlando, Florida, retained Elliott on a contingent fee basis to represent him in a title dispute with a third party over land Hornsby owned in Boothbay Harbor. They executed a written fee agreement as required by Maine Bar Rule 8. The agreement limited Elliott's fee to one third of the "money damages recovery" and provided that:

> The client is not to be liable to pay compensation otherwise than from amounts collected for him by the attorney except as follows: None

The title dispute was settled in the spring of 1984 with an exchange of deeds and the payment by the third party to Hornsby of $5,000 delivered to Elliott. Elliott kept the entire amount and billed Hornsby for an additional $9,101.51, on the grounds that his efforts had enhanced the value of the property by $46,500. Hornsby died in July of 1986 with that fee dispute unresolved.

The following April, Elliott commenced a breach of contract action against Anderson, Hornsby's personal representative, in the Superior Court, and in July he filed a claim against the estate in the Lincoln County Probate Court. In September 1987, Anderson denied the claim against the estate and filed a petition for fee arbitration

under Maine Bar Rule 9, asking that Elliott be ordered to refund $2,500 to the estate. Elliott's reply to the petition addressed only the merits of Anderson's claim. A Fee Arbitration Panel held a hearing on February 18, 1988, and the same day granted Anderson the relief he requested.[2] (see App-7)

In its decision, the Panel ruled first that Elliott's evidence of an increase in value from the exchange of deeds was "insufficient and incomplete," not only failing to substantiate his appraisal of the property received but also omitting altogether the value of the property conveyed. Second, by the terms of the agreement such an increase in value, even if proven, would be irrelevant. When the agreement was negotiated, Hornsby had expressly rejected

Elliott's proposals for a retainer, saying that "we both deal with contingent fee agreements all the time. It is like shaking dice to see what we all get." The panel

> conclude[d] that [Hornsby] and [Elliott], both being practicing lawyers, entered into a bargain for fees and that they are both bound by that bargain. In the absence of an agreement by Petitioner, we would feel obliged to order a refund of all monies in excess of $1,666.67 [one third of the $5,000 paid to Elliott] .... [But, a]t the close of the hearing, Petitioner agreed that [$2,500] was all he was seeking.

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[2]Thus Elliott's objection under M. Bar R. 9(h) (3) that the award is untimely has no merit. Subsection 9(h)(3) requires only that the decision "be rendered promptly after the close of the hearing, and within 10 days thereof." Although the first copy sent was missing the signature page, a copy was forwarded to Elliott "as soon as reasonably possible after the [decision] has been filed," as required by M. Bar R. 9(h)(4).

> Consequently, we ... order that that sum be paid forthwith.

Only after learning of the Panel's adverse decision did Elliott first contest its authority to resolve the dispute. When Anderson filed a motion in the Superior Court for entry of judgment confirming the arbitration award pursuant to Maine Bar Rule 9(i) and 14 M. R. S. A. Section 5937 (1980), Elliott moved under 14 M. R. S. A. Section 5938 (1980) to vacate the award, contending that the Maine Declaration of Rights forbids any compulsory arbitration law that does not provide a right to review the arbitrator's award through a jury

trial de novo.[3] The court granted Anderson's motion, entering judgment in

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[3]Elliott's motion to vacate also introduced an argument that the Fee Arbitration Commission lacks jurisdiction over a fee dispute submitted by the personal representative of a deceased client. This contention is based on a misreading of Maine Bar Rule 9(g)(11), which provides as follows:

> In the event of the death or incompetency of a party to the arbitration proceeding prior to the close of the hearing, the proceeding shall abate without prejudice to either party to proceed in a court of proper jurisdiction to seek such relief as may be warranted. In the event of death or incompetency of a party after the close of the hearing but prior to a decision, the decision rendered shall be binding upon the heirs, administrators or executors of the deceased and upon the estate or guardian of the incompetent.

Rule 9(g)(11) does not address the circumstances of the case at bar, where Hornsby's personal representative is the party in interest who has himself made the initial election to take his dispute with attorney Elliott to arbitration. The evident purpose of abatement upon

his favor for $2,500 and dismissing Elliott's pending contract action.

We affirm the judgment of the Superior Court because Elliott failed to raise his constitutional objections in a timely manner. In his reply and thereafter before the Panel, Elliott participated fully in the resolution of the dispute on its merits. He never once registered with the Panel any objection or protest, nor did he take any steps to prosecute his already pending Superior

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the client's death during the pendency of the arbitration proceeding is to relieve the client's personal representative from the obligation of completing the fee arbitration after the loss of the principal witness; the personal representative may elect anew the forum for resolution of a fee dispute that the estate now has with the attorney. Abatement in the case at bar would not serve that purpose.

Court suit for his fee or in any other way pursue collateral relief in the courts. Elliott's belated contention that he was unconstitutionally coerced into submitting to arbitration lacks an essential element -- he has made no showing that he was coerced at all.

There is a strong public policy favoring arbitration. Cf. J.M. Huber Corp. v. Main-Erbauer, Inc., 493 A.2d 1048, 1049-50 (Me. 1985) (arbitration clause). The fee arbitration mechanism created by the Maine Bar Rules encourages the efficient resolution of sensitive monetary disputes between clients and their own attorneys. That desirable objective would be seriously frustrated if an attorney could wait to see if the panel rules in his favor be-

fore claiming that the arbitration procedure is itself unconstitutional. Cf. Monmouth School Comm. v. Huston, 437 A.2d 621, 623 (Me. 1981) (party to arbitration may not wait until after decision to object to procedure); McNeal v. Black, 61 N.C. App. 305, 307, 300 S.E.2d 575, 577 (1983) (stockbroker's constitutional objection to arbitration under threat or professional sanctions untimely when first raised after client's motion to confirm: "If Black had prevailed at the arbitration hearing, it is clear that he would not be challenging the procedure at this time."). Even in the more compelling circumstance where the constitutional protection guaranteed a criminal defendant is at stake, the constitutional claim must as a rule be

preserved at trial to be recognizable on appeal. State v. Mann, 361 A.2d 897, 904 (Me. 1976).

By acquiescing the Anderson's choice of forum for the resolution of their dispute, and indeed by giving every sign of agreement that the Fee Arbitration Panel was the appropriate forum until his discovery that its decision was adverse to him, Elliott has failed to preserve any constitutional objection to the fee arbitration award against him. The constitutional question he has raised, however, is of continuing importance, and the issue has been fully briefed both by the parties and by the Bar Counsel as amicus curiae. Questions of great public interest that have not lost their controversial vitality may

properly be addressed even though they have become technically moot in the case at bar. State v. Gleason, 404 A.2d 573, 578 (Me. 1979); King Resources Co. v. Environmental Improvement Comm'n, 270 A.2d 863, 870 (Me. 1970). The prudential considerations that preclude the premature resolution of constitutional questions are absent here, and there is no value in restraint. Indeed, the Supreme Judicial Court would be remiss in its supervisory responsibility over the bar if, sitting as the Law Court, it were to deliver an opinion implying that the constitutional objection to the Maine Bar Rules might be valid, though its resolution be postponed because the claimant at bar had failed to preserve it.

II.

Arbitration Under Maine Bar Rule 9

Before discussing our grounds for upholding the procedure the Supreme Judicial Court has established for resolving fee disputes, we explain more fully the nature and history of Rule 9 arbitration. The predecesor to the present attorney fee arbitration system was a voluntary program begun by the Maine State Bar Association (MSBA) in the fall of 1975, at a time when the shortcomings of exclusive reliance on the courts had become apparent and many states were adopting voluntary or mandatory programs for alternative resolution of attorney-client fee disputes. The MSBA fee arbitration panels heard some fifteen to twenty cases during each

year of the program's existence. The program was "very well received" by those who participated, see Report of the Standing Committee for the Resolution of Fee Disputes, 13 Me. Bar Bull. 156 (1979), but participation, as these figures show, was fairly limited.[4]

The shortcomings of voluntary arbitration were not unique to Maine. The American Bar Association (ABA) established a special committee to look into the problem; the committee observed that the vast majority of lawyers shared their clients' desire for a fair and effective procedure for resolving fee dis-

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[4] The number of fee arbitration hearings each year has now risen fairly steadily from about 30 in 1980 to almost 50 in 1987, and additional fee disputes are resolved less formally at earlier stages of Rule 9 proceedings.

putes, but the few "whose billing practices do not reflect a sense of professional responsibility" were precisely those most likely to become involved in fee disputes in the first place. The ABA's proposed solution was a system of compulsory but only partially binding arbitration under the auspices of a state bar association: an attorney need not consent to be bound by the arbitrator's award, but the bar association would not provide free representation for the client in any legal proceedings to collect any portion of the disputed fee found excessive by the arbitrators. See ABA Section of Bar Activities, Report of the Special Committee on Reso-

lution of fee Disputes (1976).[5]

In Maine, the impetus for going beyond voluntary arbitration came from the proceedings during the mid-1970's that led to the promulgation of the Maine Bar Rules (including the first official Maine Code of Professional Responsibility) and the formation of the Board of Overseers of the Bar.[6]

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[5] This procedure was described as "cumbersome" in In re LiVolsi, 85 N.J. 576, 600 n.26, 428 A.2d 1268, 1280 n.26 (1981), and erroneously described as having been adopted in Maine.

[6] The court received assistance from many sources in its task of soliciting input from the general public and the legal profession. In particular, the Select Commission on Professional Responsibility chaired by Colby College President Robert E. L. Strider, consisting of four lay members and eleven attorneys, was established by order of the Supreme Judicial Court to conduct hearings and to draft a proposed Maine Code of Professional Responsibility. Me. Rptr., 381-384 A.2d LXIX-LXX (Jan. 17, 1978).

A major purpose of the new Board was to take jurisdiction over certain activities previously conducted by the Maine State Bar Association but deemed more appropriately exercised by an official body than by a voluntary association. In its order of May 11, 1978, creating the Board of Overseers, the Supreme Judicial court declared one of the Overseers' responsibilities to be "[t]o establish and maintain an arrangement for arbitration of fee disputes which, when invoked by any client, will be compulsory upon the client's lawyer as a condition precedent to his right to engage in the practice of law in the State." 12 Me. Bar Bull. 112 (1978). This proposal did not generate the sort of controversy that surrounded a simi-

lar program for client-initiated compulsory fee arbitration introduced in New Jersey at about the same time. See In re Livolsi, 85 N.J. 576, 582, 428 A.2d 1268, 1270-71 (1981).

The arrangement thereby established was promulgated as Maine Bar Rule 9, taking effect on November 1, 1978. In its current form, which is essentially identical to the original, Rule 9 provides for a Fee Arbitration Commission sitting in five panels of three corresponding to five geographic districts,[7] each panel with one lay member and two

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[7] Originally there had been four panels, as under the former voluntary scheme, but the district encompassing both Cumberland and York Counties was split in 1988 because a substantial increase in the number of cases had resulted in a backlog.

attorneys. M. Bar R. 9(a), 9(c). Proceedings may be initiated by "a complaint from any source[8] regarding legal fees paid to or charged by an attorney admitted to the Bar of this State," and the petitioner must agree to be bound by the Commission's decision. M. Bar R. 9(e)(1). A hearing is held only if efforts to resolve the dispute less formally fail and the petition withstands a preliminary screening by the Bar Counsel and the chair of the Commission. M. Bar R. 9(e)(1)-9(e)(3). If the dispute is not resolved within 30

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[8]The procedure established for processing the complaint does, however, anticipate that the petition will be filed by or on behalf of the client rather than the attorney.

days after the petition is filed, a copy of the petition is sent to the attorney along with "a copy of these procedures and any relevant rules and regulations" and a blank Respondent's Reply and Submission to Arbitration form. M. Bar R. 9(e)(4)(A). The attorney has 30 days to reply. M. Bar R. 9(f).

The chair of the panel must "make every effort" to schedule a hearing within 60 days of receiving the petition and any reply. Both parties are then sent notice of hearing, which includes the names and addresses of the arbitrators and advises the parties "of their right to present witnesses and documentary evidence in support of their positions, and at their own expense, to have a record of the proceedings made."

M. Bar R. 9(e)(5). Each party has the right to hire an attorney at any stage, and the panel may at its discretion appoint a volunteer attorney to present either party. M. Bar R. 9(e)(6). The chair of the panel "shall exercise all powers relating to the conduct of the hearing," and is not bound by the Maine Rules of Evidence. M. Bar R. 9(g)(6). The parties and the arbitrators may question any witness and may demand that the witness testify under oath. M. Bar R. 9(g)(7)-9(g)(8).

On motion by the petitioner, all other judicial and administrative proceedings relating to the fee dispute shall be stayed pending the outcome of the arbitration "and the award hereunder shall be determinative of the action so

stayed." M. Bar R. 9(e)(5)(D). The petitioner is responsible for notifying the Commission of all pending actions, and must certify that the matter has not yet been finally adjudicated by a court or administrative agency. M. Bar R. 9 (e)(1)(D). If the attorney fails to make a timely reply or fails to appear at the hearing, the panel may proceed "and the attorney shall be bound by the findings and award of the panel in the same manner, and with the same effect, as a default judgment entered by the Superior Court." M. Bar R. 9(f); see M. R. CivP. 55.

The arbitration hearing is private and all documents except the award itself are confidential. M. Bar R. 9(j). That award must be rendered, in writing,

within 10 days after the hearing unless the chair of the Commission extends the deadline, and must include "a statement of the amount or nature of the award, if any, and the terms of payment, if applicable." M. Bar R. 9(h)(1)-9(h)(3). It may include a signed dissent if the panel is divided. M. Bar R. 9(h)(1). The award becomes final as soon as it is signed and filed. M. Bar R. 9(h)(1). Copies must then be forwarded to the parties and their counsel "as soon as reasonably possible." M. Bar R. 9(h)(4).

The arbitration proceeding is governed by the Maine Uniform Arbitration Act, 14 M.R.S.A. Sections

5927, 5929-5949 (1980).[9] with all members of the panel assuming the rights and duties of neutral arbitrators under the Act. M. Bar R. 9(g)(3), 9(i). Under the Act either party may file a motion to confirm the award in a summary proceeding in the Superior Court. 14 M.R.S.A. Sections 5937, 5942. There is no provision for a trial de novo, by jury or otherwise. The opposing party may move to vacate the award, but judicial review of any kind is highly cir-

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[9] The section of the Act not cited, 14 M.R.S.A. Section 5928 (1980), governs motions to compel or stay arbitration and resolution of pending court actions in contractual arbitration proceedings. M. Bar R. 9(i) was amended in 1985 to include an express provision that section 5928 is inapplicable. Me. Rptr., 479-487 A.2d LXVII, LXXXIV. See also Nisbet v. Faunce, 432 A.2d 779, 781-82 (Me. 1981).

cumscribed: if the arbitrators have acted within their powers the court must enter judgment on the award unless there was fraud, corruption, partiality, or similar misconduct. Id. Sections 5937-5941. Either party may also move to modify or correct the award, but only to rectify a technical error or an "evidence miscalculation" or misdescription. Id. Sections 5939.

III.

The Constitutionality of Rule 9 Arbitration

Maine Bar Rule 9 enables a client to prevent his attorney from having their fee dispute heard by a jury, but that by itself does not violate the constitutional guarantee of the right to a civil jury, Me. Const. art I, Section 20.

Elliott's thesis that a suit to recover a contingent fee is just like any other suit for money damages for breach of contract -- in other words, that the attorney-client relationship is just like any other contractural arrangement -- ignores the uniqueness of the attorney's relation to the court and to the client.

The "judicial power of this State," Me. Const. art. VI, Section 1, is itself of constitutional dimension, and is the exclusive province of the courts. Me. Const. art. III, Section 2; art. VI, Section 1. See Board of Overseers of the Bar v. Lee, 422 A.2d 998, 1001-02 & n. 10 (Me. 1980), appeal dismissed, 450 U.S. 1036 (1981). The Supreme Judicial Court, like other state high courts, holds "plenary, exclusive, and almost

unchallenged power over the practice of law in all its aspects." In re LiVolsi, 85 N.J. at 585, 428 A.2d at 1272. The Supreme Court in its rulemaking capacity binds not only the bar and all other courts; these rules also have the full force in our deliberations as the Law Court.[10] See State v. Doucette, 544 A.2d 1290, 1294 & n.3 (Me. 1988) (Supreme Judicial Court sitting as Law Court lacks power to amend Maine Rules of Evidence to provide case-by case exceptions

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[10] The dichotomy between the Supreme Judicial Court as rulemaker and the Supreme Judicial Court sitting as the Law Court does, however, place responsibility on both sides; the Law Court has the power and the duty to invalidate any rule of court repugnant to the constitution or to a controlling statute. See State v. Kelly, 376 A.2d 840, 844 (Me. 1977).

to hearsay rule on the lines of F.R. Evid. 803(24), which has no Maine counterpart). Upon taking the ancient oath to "delay no man for lucre or malice, but ... conduct yourself in the office of any attorney .. with all good fidelity, as well as to the courts, as to your clients," 4 M.R.S.A. Section 806 (1979),[11] the attorney enters into a

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[11] The language of this oath follows, with only a few stylistic changes, the text of a colonial statute in 1701 that has been in force continuously since that date in Maine and in Massachusetts. A version of that oath was administered to the attorneys admitted to the bar when common law courts were first established in Massachusetts in 1686. The text has been traced to lawyers' oaths published in England at about that time and dating back to the thirteenth century. See generally Neal W. Allen, The Maine Attorney's Oath of 1686 (unpublished addressed to newly admitted members of the Maine bar, October 1, 1986).

regulated profession and becomes an officer of the court subject to the court's inherent power. Board of Overseers of the Bar v. Lee, 422 A.2d at 1002-03.

The judicial power encompasses all regulation of the legal profession necessary to the proper administration of justice. "Besides standards readily derived from the criminal alw and from the general law pertaining to fiduciaries, certain standards peculiarly applicable to attorneys are derived from traditions of the bar designed to assure fairness and efficiency of court procedures and adjudications and to foster public confidence in such fairness and efficiency." In re Dineen, 380 A.2d 603, 604 (Me. 1977). One of these traditions the

Supreme Judicial Court has embodied in Maine Bar Rule 3.3(a), which begins:

> A lawyer shall not enter into an agreement for, charge, or collect an illegal or excessive fee. A fee is excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee.

This obligation is no recent innovation. The tradition of service to the client has long been an aspiration of the legal profession; it has been one of the primary sources for the classical models of "professionalism" that emphasize the subordination of financial gain to an ideal of public service enforced by professional discipline. See generally Americal Association of Law Schools, Selected Readings of the Legal Profession 52, 63-76 (1962).

Canon 13 of the former Canons of Ethics of the American Bar Association provided: "A contract for a contingent fee ... should always be subject to the supervision of a court, as to its reasonableness." [12] A century ago we remarked

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[12] This supervision has been exceptionally strict in Maine. Since statehood, champerty has been prohibited by statute, see P.L. 1821, ch. 20, and contingent fee arrangements were considered champertous. See Hinckley v. Giberson, 129 Me. 308, 151 A. 541 (1930). Only in 1965, by which time contingent fees were permitted in the other 49 states, did the legislature finally amend the champerty statute to exempt contingent fee agreements in civil actions. P.L. 1965, ch. 333, now codified at 17-A M.R.S.A. Section 516(2) (1983). The Supreme Judicial court immediately promulgated M.R.CivP 88, requiring that contingent fee agreements be in writing, regulating the form and substance of such agreements, and providing for judicial review before a single justice of the Supreme Judicial Court or of the Superior Court to determine the reasonableness of the agreement. See generally Field, McKusick & Wroth, Maine Civil Practice Section 88.1 (2d ed.

on the law's "great[] desire[] that the attorney should be satisfied with a reasonable compensation." Burnham v. Heselton, 82 Me. 495, 500, 20 A. 80, 81 (1890). And much earlier, the lawyer of the Massachusetts Bay Colony swore to "increase no fees but be contented with such fees as are by order of Council or the Judge of this Court allowed." Josiah H. Benton, The Lawyer's Official Oath and Office 59 (1909).

Thus attorney fees, like all other aspects of the practice of law, have always been the subject of court regula-

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1970). Maine Bar Rule 8, which superseded Civil Rule 88, follows its predecessor almost verbatim except that MRCivP 88(f), which provided for review in a nonjury court proceeding, has been replaced by Maine Bar Rule 8(f), which provides for "review in accordance with Rule 9."

tion; for the sound administration of justice that regulation needs to include an effective procedure for enforcement of the attorney's professional duty to charge only a reasonable fee. The court's regulation of the attorney-client relationship, however, must be more than a disciplinary mechanism. The possibility of ethical violations by lawyers in charging for their services is not the only basis, or numerically the most significant basis, for the need for an effective method of resolving fee disputes. Legitimate disagreements over fees can and do arise between clients and their attorneys, in the same way that they can and do arise between other contracting parties. See, e.g., Shapiro v. Drummond, Woodsum Plimpton & MacMahon, P.A., 551 A.2d 863 (Me. 1988).

But an attorney-client fee dispute is no ordinary contractual controversy. Members of the public as a practical matter have access to the courts only through their attorneys, and that access is impaired by collateral controversies over legal charges. Furthermore, in the view of many observers, attorney fee disputes are the principal source of public dissatisfaction with the judicial system. See, e.g. ABA Section of Bar Activities, Report of the Special Committee on Resolution of Fee Disputes, at 1; In re LiVolsi, 85 N.J. at 585, 428 A.2d at 1273. Practicing lawyers have few more difficult tasks than billing their clients, and at the same time clients often misunderstand the basis of their attorneys' bills.

In these circumstances it is advantageous to both lawyers and clients to have available a simple, speedy, and reliable system for resolving fee questions. In particular, the system must be one that can be used effectively by clients whose experience with the legal system is likely to be limited and bewildering, and who in disputes with their own attorneys go into court on an unequal footing. In light of that need, the Supreme Judicial Court's requirement that an attorney be prepared to submit to a less formal nonjury adjudication of fee disputes is an entirely reasonable exercise of the judicial power to superintend the bar.

Rule 9 is a narrowly tailored response to a problem that arises not

infrequently in the attorney-client relationship. Rule 9 replaces, at the client's request, any trial in court with a method of dispute resolution that accords full due process to the attorney, including the judicial safeguards of the Uniform Arbitration Act. Furthermore, the entire fee arbitration system operates under the direction of a creature of the court, the Board of Overseers of the Bar. The lawyer appealing in the case at bar makes no argument, and could make no argument, that fee arbitration is likely to produce any less reliable, or any less fair, determination than a jury trial. In these circumstances, the court's action is providing the client a faster and procedurally less forbididng forum

for fee disputes, while at the same time assuring the attorney a fair and reasonable determination, comes within the court's constitutional authority to regulate the attorney-client relationship. As such, it does not improperly infringe any constitutional jury right. Nothing more is required for the Maine fee arbitration system to pass constitutional muster.

Our decision today is in accord with those in the only other state that has encountered a similar constitutional challenge to attorney fee arbitration. Both state and federal courts have upheld the New Jersey Supreme Court's inherent power to impose a client-initiated fee arbitration program by rule of court adopted at about the same

time as the Maine plan. See In re Livolsi, 85 N.J. 576, 428 A.2d 1268 (1981);[13] Kelley Dyre & Warren v. Murray Indus., Inc., 623 F. Supp. 522 (D.N.J.

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[13] As an alternative ground for its decision, the New Jersy Supreme Court relied upon a line of New Jersey cases establishing that a client disputing an attorney fee had a suit in equity to determine the reasonable level of compensation and to enjoin an action at law by an attorney seeking to collect an excessive fee. See In re Livolsi, 85 N.J. at 587-90, 428 A.2d at 1273-75. Thus an attorney in New Jersy had no a priori right to have a fee dispute decided by a jury even in the absence of compulsory arbitration.

Maine too has always recognized that lawyers stand in a fiduciary relationship to their clients. See In re Dinéen, 380 A.2d 603 (Me. 1977); Burnham v. Heselton, 82 Me. 495, 500, 20 A. 80, 81, (1890); Dunn v. Record, 63 Me. 17, 19 (1874). But, for the purposes of this case, we have no need of deciding whether in Maine the equity powers of the Maine Superior Court are as extensive as were those of the New Jersy Court of Chancery.

1985). See Annotation, Validity of Statute or Rule Providing for Arbitration of Fee Disputes Between Attorneys and Their Clients, 17 A.L.R. 4th 993 (1982). In Kelley Dyre, a New York firm practicing in New Jersy had argued that LiVolsi was not binding on nonresidents whose jury right was guaranteed by the Seventh Amendment rather than by the New Jersey Constitution, but the court replied:

> (T)he State may impose reasonable conditions and limitations upon those who wish to exercise the[e] privilege [of practicing law]. Here the Court Rules are reasonable and [the plaintiff law firm] has opted to be bound by them. No Seventh Amendment rights re implicated.

623 F. Supp. at 527.

The attorney stands in a relationship of trust and confidence to the

client and to the court. The overriding responsibility and authority of the Supreme Judicial Court to superintend that professional relationship is a complete answer to the constitutional challenge to Maine's client-initiated fee arbitration. Nothing in the jury trial provision of the Maine Constitution stands in the way of this simplified, expeditious, and fair way of resolving fee disputes between attorney and client.

The entry is:

Judgment affirmed.

client and to the court. The overriding responsibility and authority of the Supreme Judicial Court to superintend that professional relationship is a complete answer to the constitutional challenge to Maine's client-initiated fee arbitration. Nothing in the jury trial provision of the Maine Constitution stands in the way of this simplified, expeditious, and fair way of resolving fee disputes between attorney and client.

The entry is:

Judgment affirmed.

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STATE OF MAINE

SUPREME JUDICIAL COURT
Sitting as the Law Court
Docket No. LIN-88-190

HOWARD A. ANDERSON, JR., Appellee	)	
vs.	)	ORDER
RICHARD W. ELLIOTT, Appellant	)	

Upon appellant's motions to stay the mandate pending his filing of a petition for certiorari, to amend the decision, and to reconsider the decision, it is

ORDERED:

1. Appellant's motion for stay of mandate is hereby GRANTED IN PART. The mandate shall issue at 4:00 p.m. on Monday, April 24, 1989. The mandate shall not be further stayed unless the Supreme Court of the United States so orders.